Supreme Court, U.S.
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NO. 98-1038

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ROLF LARSEN,

Petitioner,

v.

ROY C. AFFLERBACH, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether state Senators are entitled to legislative immunity when conducting impeachment proceedings pursuant to a constitutional mandate which makes the obligation to try all impeachments the sole province of the state Senate.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff and appellee below):

ROLF LARSEN, a former member of the Supreme Court of Pennsylvania

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Respondents (defendants and appellants below):

The present members of the Senate of the Commonwealth of Pennsylvania who are named as defendants in this action, and who are respondents to Larsen's petition, are as follows: GIBSON E. ARMSTRONG, ALBERT V. BELAN, CLARENCE D. BELL, LEONARD J. BODACK, DAVID J. BRIGHTBILL, VINCENT J. FUMO, STEWART J. GREENLEAF, MELISSA A. HART, EDWARD W. HELFRICK, EDWIN G. HOLL, ROBERT C. JUBELIRER, GERALD J. LAVALLE, CHARLES D. LEMMOND, JR., F. JOSEPH LOEPER, ROGER A. MADIGAN, ROBERT J. MELLOW, HAROLD F. MOWERY, JR., RAPHAEL J. MUSTO, MICHAEL A. O'PAKE, TERRY L. PUNT, JAMES J. RHOADES, ROBERT D. ROBBINS, FRANK A. SALVATORE, ALLYSON Y. SCHWARTZ, PATRICK J. STAPLETON, J. BARRY STOUT, RICHARD A. TILGHMAN, JACK WAGNER, and NOAH W. WENGER.

The former Senators who remain named as defendants, and who are respondents herein, are as follows: ROY C. AFFLERBACH, ANTHONY B. ANDREZESKI, EARL BAKER, MICHAEL E. BORTNER, J. DOYLE CORMAN,

MICHAEL M. DAWIDA, D. MICHAEL FISHER, DAVID W. HECKLER, ROXANNE H. JONES (deceased), H. CRAIG LEWIS, J. WILLIAM LINCOLN, BRUCE S. MARKS, FRANK A. PECORA, JOHN E. PETERSON, EUGENE E. PORTERFIELD, JEANETTE F. REIBMAN, TIM SHAFFER, JOHN J. SHUMAKER, WILLIAM J. STEWART and HARDY WILLIAMS.

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TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

PRELIMINARY STATEMENT 1

COUNTER-STATEMENT OF THE CASE 1

A. Underlying Facts 2

B. Procedural History 3

REASONS FOR DENYING THE PETITION 7

I. There Are No Special Or Important Reasons For Granting The Petition For A Writ Of Certiorari. 7

II. The Question Of Larsen's Alleged "Property Interest" In Elected Office Under Pennsylvania Law Is Not Appropriate For Review By This Court. 12

CONCLUSION 15

APPENDIX

Amended Complaint in *Larsen v. Senate of the Commonwealth of Pennsylvania, et al.*, No. 95-CV-1540 (M.D. Pa.) A1

TABLE OF AUTHORITIES

CASES

Page

Acierno v. Cloutier, 40 F.3d 597 (3d Cir. 1994) 4

Board of Regents v. Roth, 408 U.S. 564 (1972) 13

Bogan v. Scott-Harris, 523 U.S. 44, 118 S. Ct. 966 (1998) 6, 7

Brown v. Griesenauer, 970 F.2d 431 (8th Cir. 1992) . 10, 11

Butler v. Pennsylvania, 51 U.S. 402 (1850) 13

Cohen v. Beneficial Industrial Loan Corp, 337 U.S. 541 (1972) 4

Davids v. Ackers, 549 F.2d 120 (9th Cir. 1977) 6

Doe v. McMillan, 412 U.S. 306 (1973) 8

Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) 7, 8, 10

Hastings v. United States, 837 F. Supp. 3 (D.D.C. 1993); 9

Hastings v. United States Senate Impeachment Trial Com., 716 F. Supp. 38 (D.D.C.), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989) 9

In re 1991 Pennsylvania Legislative Reapportionment Commission, 609 A.2d 132 (Pa. 1992) 4, 13

In re Investigation by Dauphin County Grand Jury, 2 A.2d 802 (Pa. 1938) 5, 9, 10

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996) 12

Mecham v. Gordon, 751 P.2d 957 (Ariz. 1988) 9

Nixon v. United States, 506 U.S. 224 (1993) ... 2, 3, 5, 9, 11

Pulliam v. Allen, 466 U.S. 522 (1984) 11

Ritter v. United States, 84 Ct. Cl. 293 (1936), *cert. denied*, 300 U.S. 668 (1939) 9

Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980) 11

Spallone v. United States, 493 U.S. 265 (1990) 11

Tenney v. Brandhove, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951) 5, 6, 7, 8, 11

STATUTES

U.S. Const. Art. I, § 3, cl. 6 8

U.S. Const. Art. I, § 10 14

28 U.S.C. § 1292(b) 4

42 U.S.C. § 1983 ..... 5, 7, 10

Fed. R. App. P. 4

Pa. Const. Art. VI, § 5 ..... 2, 8

OTHER AUTHORITIES

Alexander Hamilton, The Federalist 8, 9

PRELIMINARY STATEMENT

Respondents, certain present and former members of the Senate of the Commonwealth of Pennsylvania, respectfully request this Court to deny the Petition for a Writ of Certiorari filed by Rolf Larsen. The holding of the Third Circuit that the Senators were entitled to legislative immunity from claims relating to their participation in an impeachment trial does not present an issue which merits consideration by this Court. The Court of Appeals's holding simply recognized the legislative and political roles that impeachment proceedings have traditionally played in our society, and does not create a split among the circuits warranting review.

COUNTER-STATEMENT OF THE CASE

Rolf Larsen ("Larsen") was a Justice on the Supreme Court of Pennsylvania until he was: (a) suspended from office by an order of the Supreme Court of Pennsylvania, based on allegations that he engaged in criminal activities; (b) removed from office based on a conviction on state drug charges; (c) removed from office by an order of the Pennsylvania Court of Judicial Discipline; and (d) convicted on articles of impeachment and barred from holding public office by the Pennsylvania Senate. Larsen's Petition before this Court involves his effort to overturn his conviction of impeachment by the Pennsylvania Senate.[1]

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1. Larsen also sued the Supreme Court of Pennsylvania, the Administrative Office of Pennsylvania Courts, the Pennsylvania Court of Judicial Discipline, the Pennsylvania Judicial Conduct Board, and the individual members of those entities. Those claims are not relevant to Larsen's petition here. Larsen's petition is, however, related to another Petition for Writ of Certiorari currently pending before this Court. *Nix v. Larsen*, No. 98-988 (filed December 17, 1998). *Nix v. Larsen* involves Larsen's claims against certain present and former members of the Supreme Court of Pennsylvania and two employees of the Administrative

(continued...)

Larsen's Statement of the Case includes several factual allegations not contained in the record below. The district court decided this case in the context of a motion to dismiss, and, accordingly, only those facts alleged in Larsen's Amended Complaint are to be accepted as true. Larsen quoted excerpts of his Amended Complaint in the Appendix attached to his Petition. A complete copy of the Amended Complaint is attached hereto (A1-A28).

For purposes of addressing Larsen's petition, however, only a few undisputed facts are of relevance.

A. Underlying Facts

Larsen was elected to the Supreme Court of Pennsylvania in 1977, for a ten year term commencing January, 1978, and was reelected for a second ten year term beginning in January, 1988.

On May 24, 1994, the Pennsylvania House of Representatives adopted seven articles of impeachment against Larsen and presented them to the Pennsylvania Senate.

Article VI of the Pennsylvania Constitution requires that all articles of impeachment issued by the House be tried by the Pennsylvania Senate. On June 23, 1993, the Senate had adopted Article X of the Rules of Practice and Procedure in the Senate when sitting on Impeachment Trials. This Article, which contains procedures substantially identical to those adopted by the federal Congress, provided the framework by which the Pennsylvania Senate conducted Larsen's impeachment trial. Specifically, Article X delegated the responsibility of hearing live testimony to a committee of the Senate, which then was to issue a final report to the full Senate for consideration. *Compare Nixon v. United States*, 506 U.S.

1.(...continued)
Office of Pennsylvania Courts and the defense of qualified immunity.

224, 227-29 (1993) (explaining the rules adopted by Congress for the impeachment trial of Judge Nixon, including the referral to a Committee of the Senate).

On September 27, 1994, after a month of hearings, the Senate Impeachment Trial Committee submitted its final report to the full Senate, containing a summary of all of the evidence presented to the Committee. The full Senate then heard arguments from both sides of the impeachment proceeding.

On October 4, 1994, the Senate voted to convict Larsen on one article of impeachment, and to acquit him on the remaining six articles. The Senate then voted unanimously to bar Larsen from holding any office of trust or profit in Pennsylvania in the future.

B. Procedural History

On September 13, 1995, Larsen commenced this action against the Senate of the Commonwealth of Pennsylvania, and certain present and former members thereof (collectively, the "Senators").

In his Amended Complaint, Larsen alleged that the manner in which the Senate conducted his impeachment trial violated his rights under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment because, in his opinion, the Senate's procedures did not have all the elements of a judicial criminal prosecution. In addition, Larsen alleged that the impeachment conviction violated his rights under the First Amendment because, he speculated, the Senators who voted to convict him were motivated by a desire to retaliate against him for statements he had previously made accusing members of the Supreme Court of Pennsylvania of wrongdoing.

The Senators moved to dismiss Larsen's claims against them on the grounds that the claims were not justiciable; that they were barred by the Eleventh Amendment, legislative

immunity and qualified immunity; and that Larsen's Complaint failed to state a claim for which relief may be granted.

The district court held that Larsen's claims were justiciable, but that they were barred by the Eleventh Amendment and the doctrine of legislative immunity. Based on dictum from a previous opinion from the Court of Appeals for the Third Circuit[2], however, the district court held that legislative immunity did not bar Larsen's claims for prospective injunctive relief. Thus, under the district court's opinion, Larsen's substantive claims remained viable. Addressing the merits of Larsen's claims, the district court, *inter alia*, denied the Senators' motion to dismiss Larsen's Due Process claim, finding that Larsen had a "highly circumscribed" property interest in his elected office, despite the fact that the Pennsylvania Supreme Court had previously held that elected officials in Pennsylvania have no constitutionally protected interest in elected office. *In re 1991 Pennsylvania Legislative Reapportionment Commission*, 609 A.2d 132 (Pa. 1992). The district court did not address the Senators's claims of qualified immunity, implicitly denying that defense.

The district court certified the question of whether Larsen had a property interest in elected office for interlocutory appeal under 28 U.S.C. § 1292(b).

The Senators appealed the district court's improper limitation of legislative immunity to claims for monetary damages only, as well as the district court's implicit denial of their claims of qualified immunity, to the Court of Appeals for the Third Circuit under the collateral order doctrine. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1972). In addition, the Third Circuit accepted jurisdiction over the certified question involving Larsen's alleged property interest in elected office under 28 U.S.C. § 1292(b) and Rule 5, F.R.A.P. The Senators also questioned the district court's

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2. *Acierno v. Cloutier*, 40 F.3d 597, 608 n.8 (3d Cir. 1994)

determination that this case was justiciable and, as a matter of subject-matter jurisdiction, that issue was also properly before the Court of Appeals.

In an opinion dated August 11, 1998, the Court of Appeals affirmed the district court's holdings that Larsen's claims against the Senators were justiciable[3] and that legislative

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3. Before addressing the merits of Larsen's Petition, it is important to note a preliminary question; namely, whether Larsen's challenge to the Senate's impeachment trial presents a justiciable issue.

In *Nixon v. United States*, 506 U.S. 224 (1993), this Court held that an impeachment proceeding is a uniquely legislative and political function which is not appropriate for judicial review, and rejected challenges to the federal impeachment process virtually identical to the claims asserted by Larsen here. *Id.* at 237-38. The same rationale adopted by this Court in *Nixon* applies with equal force to prohibit a federal court from questioning the manner in which a state legislature tries an impeachment, particularly where the procedures employed by the state is almost identical to those adopted by the federal government. Concerns of finality and a lack of judicially manageable standards counsel against judicial involvement in impeachment proceedings. *Id.* at 739.

Just as the federal courts may not review the conduct of Congress in conducting an impeachment proceeding, a state court may not review the conduct of a state legislature in conducting impeachment proceedings. *See In re Investigation by Dauphin County Grand Jury*, 2 A.2d 802, 803 (Pa. 1938). It would be anomalous to hold that Section 1983 makes an otherwise nonjusticiable question appropriate for review in federal courts. There is no authority for the proposition that either Section 1983 or the Due Process Clause of the Fourteenth Amendment was meant "to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here." *Tenney v. Brandhove*, 341 U.S. 367, 76 (1950), *reh'g denied*, 342 U.S. 843 (1951). Thus, the Court of Appeals's statement that "the Fourteenth Amendment and § 1983 were

(continued...)

immunity applied to impeachment proceedings. However, the Court of Appeals reversed the district court's limitation of the scope of protection afforded by legislative immunity to claims for monetary damages only, holding instead that legislative immunity bars claims for injunctive relief as well. Thus, the Third Circuit dismissed Larsen's claims against the Senators in their entirety. The Court of Appeals did not address the certified question of Larsen's alleged property interest in elected office under Pennsylvania law.

3.(...continued)
intended to radically alter the distribution of power between the Federal Government and the states," (Appendix to Larsen's Petition at A26), which is the basis for its ruling on justiciability, is not appropriate. As this Court stated in *Tenney*: "We cannot believe that Congress – itself a staunch advocate of legislative freedom – would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us." 341 U.S. at 376.

The Court of Appeals rejected the Senators's argument on justiciability, focusing instead on the political question doctrine and its respect for coordinate branches of the federal government. We respectfully disagree with the Third Circuit's holding in this regard and submit that federal courts should decline to inject the federal judiciary into areas traditionally viewed as inherently political. *Davids v. Ackers*, 549 F.2d 120, 123 (9th Cir. 1977) (noting that, although the federal court technically had jurisdiction over the plaintiffs' challenges to the internal operations of the Arizona legislature, "[w]e have a strong feeling that if this court were to undertake to grant to plaintiffs the relief that they seek, our action would set the sometimes canonized and frequently capitalized Founding Fathers, as well as the Framers and Supporters of the Fourteenth Amendment, spinning in their graves.")

REASONS FOR DENYING THE PETITION

I. There Are No Special Or Important Reasons For Granting The Petition For A Writ Of Certiorari.

The holding of the Court of Appeals is straightforward and not controversial: Impeachment proceedings are, by definition, legislative activities. As set forth below, this has been well established since the founding of this nation, and has been recognized in numerous state and federal courts. Where the obligation for conducting impeachment trials is constitutionally assigned to the legislature, legislators' activities in those proceedings are protected by the doctrine of legislative immunity and may not be questioned in federal court.

In *Tenney v. Brandhove*, 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951), this Court held that state legislators enjoy absolute legislative immunity for actions taken within the "sphere of legitimate legislative activity." 341 U.S. at 376. This protection is essentially the same as that afforded members of Congress under the Speech and Debate Clause of the United States Constitution. Last term, this Court reaffirmed the protection afforded by legislative immunity, holding that state, regional, and local legislators "are entitled to absolute immunity from liability under § 1983 for their legislative activities." *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 970 (1998).

Thus, in determining the applicability of legislative immunity, the relevant inquiry is whether the conduct in question is within the "legitimate legislative sphere." In *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), this Court held that actions are within the "legitimate legislative sphere" where they are constitutionally assigned to the legislature:

> In determining whether particular activities . . . fall within the 'legitimate legislative sphere' . . . we must determine whether the activities are 'an integral part of the deliberative and

> communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation *or with respect to other matters which the Constitution places within the jurisdiction of either House.*'"

Eastland, 421 U.S. at 503-04 (quoting *Doe v. McMillan*, 412 U.S. 306, 314 (1973)) (emphasis supplied). Likewise, in *Bogan*, the Court noted that legislative immunity is appropriate where the legislator acts "in a field where legislators traditionally have power to act." 118 S. Ct. at 973 (quoting *Tenney*, 341 U.S. at 379); *see also Tenney*, 341 U.S. at 378 ("To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that there was a usurpation of functions exclusively vested in the Judiciary or the Executive.")

Impeachment trials are an area in which legislators traditionally have had the power to act. The Pennsylvania Constitution, like the United States Constitution, places the right and obligation to conduct impeachment trials in the Senate. Pa. Const. Art. VI, § 5 ("All impeachments shall be tried by the Senate."); U.S. Const. Art. I, § 3, cl. 6 ("[The] Senate shall have the sole Power to try all Impeachments."). Because impeachment trials are the constitutional obligation of the Senate, such proceedings are within the "legitimate legislative sphere" and are protected by legislative immunity. *See* Alexander Hamilton, The Federalist, Nos. 65 and 66.

Larsen's argument that impeachment proceedings are judicial in nature ignores the role impeachment plays in our society and fails to appreciate that impeachments have traditionally been viewed as political and legislative functions. Courts across the nation have recognized that impeachments are an area in which the judiciary should stay its hand. "The Supreme Court has construed [the Speech and Debate] clause broadly; and this Court must accordingly protect the legitimate activities of Senators acting within their constitutionally

prescribed functions, *including legislation and impeachment.*" *Hastings v. United States Senate Impeachment Trial Com.*, 716 F. Supp. 38, 42 (D.D.C.), *aff'd*, 887 F.2d 332 (D.C. Cir. 1989). "The Framers understood that impeachment trials were fundamentally political, which seems to indicate that impartiality – however much it has been present and is to be desired – is not guaranteed." *Id.* "[An impeachment] [t]rial in the Senate is a uniquely legislative and political function. It is not judicial." *Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988). *See also Nixon v. United States*, 506 U.S. 224 (1993); *Hastings v. United States*, 837 F. Supp. 3 (D.D.C. 1993); *Ritter v. United States*, 84 Ct. C1. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1939); Alexander Hamilton, The Federalist No. 65. And, in Pennsylvania, the law is clear: "[T]he courts have *no jurisdiction* in impeachment proceedings, and *no control over their conduct*, so long as actions are taken within constitutional lines." *In re Investigation by Dauphin County Grand Jury*, 2 A.2d 802, 803 (Pa. 1938) (emphasis supplied).

In *Nixon v. United States*, this Court explained that "[t]he history and contemporary understanding of the impeachment provisions support our reading of the constitutional language [that the impeachment trials are within the sole province of the Senate]." 506 U.S. at 233. Indeed, the Court noted the absence of any authority to the contrary: "The parties do not offer evidence of a single word in the history of the Constitutional Convention or in contemporary commentary that even alludes to the possibility of judicial review in the context of the impeachment powers." *Id.*

The Court of Appeals did no more than recognize the traditional role that impeachment plays in our government.

> Given that impeachments are matters 'which the Constitution places within the jurisdiction of either House,' and represent 'a field where legislators have traditionally had the power to act, we are convinced that when legislators play the role they have been given in impeachment

> proceedings, they act within the sphere of legitimate legislative activities and within their legislative capacities. Thus, the necessity for independence requires that legislators be accorded legislative immunity and 'not be questioned in any other place' concerning their activity and their decision.

Appendix to Larsen's Petition at A34 (citations omitted).

Contrary to Larsen's assertion, *Brown v. Griesenauer*, 970 F.2d 431 (8th Cir. 1992), does not create a split among the circuits which merits review by this Court. In *Brown*, a board of aldermen, acting pursuant to a Missouri statute, impeached a mayor of a small town. The impeached mayor sought review of his impeachment conviction before the Missouri state court, which granted the requested relief and vacated his impeachment conviction. Thereafter, the mayor commenced an action in federal court under Section 1983, seeking monetary damages from the board members who voted to convict him. The Court of Appeals for the Eighth Circuit held that the board members were immune from liability for monetary damages and dismissed the case.

Brown is distinguishable from the present case for at least two reasons. First, *Brown* involved a board of aldermen acting pursuant to a *statutory* grant of authority in conducting impeachment proceedings against a local mayor – not the legislative arm of a state conducting impeachment proceedings pursuant to a constitutional mandate. The fact that the Senate here was acting pursuant to a constitutional grant of authority is dispositive. *See Eastland*, 421 U.S. at 504; *see also In re Investigation by Dauphin County Grand Jury*, 2 A.2d at 803.

Second, a careful reading of the *Brown* opinion demonstrates that the Eighth Circuit's discussion of the characteristics of legislative and judicial immunity was dicta, because the resolution of that case did not turn on which

immunity doctrine applied.[4] In *Brown*, the plaintiff sought only money damages, *and did not seek injunctive relief.* 970 F.2d at 434 n.2. Both legislative and judicial immunity bar claims for money damages. *Tenney*, 341 U.S. at 379 (legislative immunity); *Pulliam v. Allen*, 466 U.S. 522 (1984) (judicial immunity). Only legislative immunity, however, also bars injunctive relief. *Supreme Court of Virginia v. Consumers Union of the United States*, 446 U.S. 719, 732-33 (1980); *Spallone v. United States*, 493 U.S. 265, 278 (1990). Because application of either legislative or judicial immunity would have supported the court's decision in *Brown*, the distinction between the two doctrines was not before the court. Only when a plaintiff seeks injunctive relief, as Larsen did here, is the scope of legislative immunity truly at issue.

This Court has recognized: "Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counter-intuitive because it would eviscerate the 'important constitutional check' placed on the Judiciary by the Framers." *Nixon*, 506 U.S. at 235. Although the Court in *Nixon* was interpreting the federal Constitution, the same rationale applies here: Impeachment trials are an inherently legislative and political function not appropriate for judicial review.

The Third Circuit's holding that impeachment trials are within the "sphere of legitimate legislative activity" is consistent with this Court's rulings in *Tenney*, *Eastland*, and *Bogan*. Accordingly, Larsen's petition for a writ of certiorari should be denied.

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4. The defendants in *Brown* relied primarily on an assertion of judicial immunity, and argued for legislative immunity in the alternative. 970 F.2d at 434.

II. The Question Of Larsen's Alleged "Property Interest" In Elected Office Under Pennsylvania Law Is Not Appropriate For Review By This Court.

Larsen's second "question presented," involving his alleged property interest in elected office under Pennsylvania law, was not considered by the Court of Appeals and need not be addressed by this Court.

The Third Circuit observed: "Because the immunity issue disposes of the entirety of Larsen's allegations against the Senators, we need not address the issue of whether Larsen possessed a constitutionally protected property interest in his elected position." Appendix to Larsen's Petition at A40. Likewise, this Court need not address the issue of whether Pennsylvania law provides for a property right in elected office unless the Court determines that legislative immunity does not apply to impeachment proceedings -- a result which, we submit, would be in error. Even in the unlikely event that the Court decides that legislative immunity was improper, the Court should remand this case to the Court of Appeals for initial consideration of the certified question. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) ("[W]e generally do not address arguments that were not the basis for the decision below.").

In any event, however, consideration of Larsen's second "question presented" would not prove fruitful because the law is clear that Larsen had no constitutionally protected interest in his elected office of Justice of the Supreme Court of Pennsylvania.[5]

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5. It is questionable whether Larsen may properly ask this Court to review the extent of his alleged property right in elected office. The district court *denied* the Senators's motion to dismiss Larsen's due process claim which had argued that Larsen did not have a property right. The *Senators* moved the district court to certify for interlocutory appeal

(continued...)

In his petition, Larsen avoids a critical issue: Property rights are determined by state law. *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). In arguing that the Court should consider the question (certified by the Senators), Larsen relies exclusively on *federal* law for the proposition that "[u]nder the Fourteenth Amendment, a state employee has a property interest in his position when he has a legitimate claim of entitlement to continued employment." Petition at 19. But, before the Fourteenth Amendment is implicated, state law must recognize a property interest that warrants protection. *Roth*, 408 U.S. at 569.

In *In re 1991 Pennsylvania Legislative Reapportionment Commission*, 609 A.2d 132 (Pa. 1992), the Pennsylvania Supreme Court squarely held that public officials have no constitutionally protected interest in elected office: "Thus, as we have held in the past, *elected officials' interest in their offices does not merit constitutional protection.*" *Id.* at 140-41 (emphasis supplied). Therefore, whatever "interest" a public official may have in elected office, according to the Pennsylvania Supreme Court, that interest simply does not constitute a property right. *See also Butler v. Pennsylvania*, 51 U.S. 402, 417 (1850) ("We have already shown, that the appointment to and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office, do not fall within the meaning of the section of the Constitution relied on by the plaintiffs in error [the impairment of contracts

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5.(...continued)
the issue of Larsen's alleged property right in elected office. Although the Third Circuit granted the Senators's petition for permission to file an interlocutory appeal regarding the property right issue, the court never addressed the issue, instead concluding that the district court should not have considered Larsen's claims at all because the Senators enjoied legislative immunity.

clause, Art. I § 10[6]; do not come within the import of the term *contracts*, or, in other words, the vested, private personal rights thereby intended to be protected" (emphasis in original).).

Thus, under Pennsylvania law, it is clear that Larsen did not have any property interest in the elected office of Justice of the Pennsylvania Supreme Court. It is also clear, therefore, that the district court erred in finding that Larsen had some sort of "highly circumscribed" property right. Nevertheless, this Court need not address whether public officials have a property interest in elected office under Pennsylvania law. The Senators were the parties who originally sought review of this question before the Third Circuit, and such review was rendered unnecessary when the Court of Appeals dismissed Larsen's claims on the grounds of legislative immunity.

Because legislative immunity bars Larsen's claims against the Senators, and because the Third Circuit did not address whether Larsen had a property interest under Pennsylvania law in his office as Justice of the Pennsylvania Supreme Court, Larsen's petition for a writ of certiorari on the property interest question should be denied.

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6. The Fourteenth Amendment was not adopted until 1868, eighteen years after the Court's decision in *Butler*.

CONCLUSION

For the foregoing reasons, we respectfully submit that this Court should deny Rolf Larsen's Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX
TABLE OF CONTENTS

Amended Complaint in *Larsen v. Senate of the Commonwealth of Pennsylvania, et al.*, No. 95-CV-1540 (M.D. Pa..) A1

UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

ROLF LARSEN, Plaintiff

v.

SENATE OF THE COMMONWEALTH OF
PENNSYLVANIA, et al., Defendants

NO. 9S-CV-1540

AMENDED COMPLAINT

Identity of the Parties

1. Plaintiff Rolf Larsen is an individual who resides in Allegheny County, Pennsylvania.

2. The Senate of the Commonwealth of Pennsylvania ("Senate") is an unincorporated association consisting of fifty members with offices in Harrisburg, Pennsylvania.

3. At all times relevant herein, the Senate Consisted of Senators: Roy C. Afflerbach, Anthony B. Andrezeski, Gibson E. Armstrong, Earl Baker, Albert V. Belan, Clarence D. Bell, Leonard J. Bodack, Michael E. Bortner, David J. Brightbill, J. Doyle Corman, Michael M. Dawida, Michael B. Fisher, Vincent J. Fumo, Stewart J. Greenleaf, Melissa A. Hart, David W. Heckler, Edward W. Helfrick, Edwin G. Holl, Roxanne H. Jones, Robert C. Jubelirer, Gerald J. Lavalle, Charles D. Lemmond, Jr., H. Craig Lewis, J. William Lincoln, F. Joseph Loeper, Roger A.

Madigan, Bruce S. Marks, Robert J. Mellow, Harold F. Mowery, Jr., Raphael J. Musto, Michael A. O'Pake, Frank A. Pecora, John E. Peterson, Eugene E. Porterfield, Terry L. Punt, Jeanette F. Reibman, James J. Rhoades, Robert D. Robbins, Frank A. Salvatore, Allyson Y. Schwartz, Tim Shaffer, John J. Shumaker, Patrick J. Stapleton, William J. Stewart, J. Barry Stout, Richard A. Tilghman, Jack Wagner, Noah W. Wenger, and Hardy Williams.

4. The Supreme Court of Pennsylvania is the highest appellate court in the Commonwealth of Pennsylvania and has a location in (Middle District) Harrisburg, Pennsylvania.

5. The Supreme Court of Pennsylvania consisted of Justices Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, Frank Montemuro, and Ronald Castille, at all times relevant herein.

6. The Court of Judicial Discipline ("CJD") is an eight member unincorporated State Administrative tribunal that sits and maintains offices in Harrisburg, Pennsylvania.

7. Joseph F. McCloskey, William F. Burns, Dawson R. Muth, Peter DePaul, Carol K. McGinley, Christine L. Donohue, Justin M. Johnson and William Cassenbaum were members of the Court of Judicial Discipline at all times relevant herein.

8. The Judicial Conduct Board ("JCB") is a twelve member unincorporated State Board which maintains its offices in Harrisburg, Pennsylvania,,whose function is to submit petitions, etc., to the CJD in order to activate the CJD.

9. Joseph A. Del Sole, Gerard P. Egan, Arthur J. Edmunds, Diane M. Edmundson, John W. Herron, Frederick Wells Hill, Esquire, Sister Matthew Anita MacDonald, Gerald J. O'Connor, Andrew Palm, Charles W. Rubendall, II, James E. Russo, Bernard C. Watson, were members of the JCB at all times relevant herein, and William J. Arbuckle, III, Bruce A. Antkowiak, and Thomas A. Bergstrom were employees of the JCB at all times relevant herein.

10. Defendant Administrative office of Pennsylvania Courts is an unincorporated body whose function is to assist in administering the Pennsylvania Court system, and which maintains offices in Mechanicsburg, Pennsylvania.

11. Nancy M. Sobolevitch was the Court Administrator of Pennsylvania at all times relevant herein with an address at Mechanicsburg, Pennsylvania.

12. David A. Frankforter was the Manager of Human Resources of the Court Administrator of Pennsylvania at all times relevant herein, with an address at Mechanicsburg, Pennsylvania.

13. All defendants are being sued in their official and personal capacities, and who acted under color of state law at all times relevant herein.

Jurisdiction

14. This court has jurisdiction under 28 U.S.C., Section 1331, providing jurisdiction over cases involving federal questions, and 28 U.S.C., Section 1343 and 42 U.S.C., Section 1983, providing jurisdiction over cases

involving civil rights and violations of the Constitution of the United States.

Part I(a) - Larsen v. Senate and Senators

15. The Senate and all Senators above are made defendants herein.

16. Rolf Larsen served as a judge on the Court of Common Pleas of Allegheny County from 1974 to 1978, and as a Justice on the Supreme Court of Pennsylvania from 1978 to 1994. Justice Larsen was elected to the Supreme Court for a 10-year term, beginning in January 1978, and won a retention election for a 10year term beginning in January 1988.

17. In about 1988, the Judicial Inquiry and Review Board ("JIRB") charged Justice Larsen with several violations of Article V, Section 17(b), of the Pennsylvania Constitution, and the Code of Judicial Conduct, and began an investigation of the alleged violations.

18. On July 17, 1991, the JIRB issued "Report of the JIRB to the Supreme Court of Pennsylvania, Part II." The JIRB found Justice Larsen, acting without improper motive, had created an appearance of impropriety by meeting ex parte with a trial judge in a then-pending action in Allegheny County Court of Common Pleas. The JIRB recommended that Justice Larsen be publicly reprimanded.

19. On October 14, 1992, the Supreme Court of Pennsylvania, by Justices Zappala and Cappy, with Justice Papadakos dissenting, issued a per curium order, without opinion, adopting the JIRB report and recommendation.

20. On November 24, 1992, Justice Larsen served his petition for disqualification and recusal of Justices Zappala and Cappy. Justice Larsen served supplemental and second supplemental petitions on December 1.4, 1992, and January 7, 1993, respectively.

21. The petitions for disqualification and recusal raised serious questions about the impartiality and motivation of Justice Zappala and Justice Cappy during the JIRB investigation of Justice Larsen and in deciding to reprimand Justice Larsen. The petitions asked Justices Zappala and Cappy to recuse themselves, or, in the alternative, that they be disqualified from considering the JIRB report and recommendation.

22. The petitions made general allegations as to the motivations of Justice Zappala and Justice Cappy, and specific allegations of acts of impropriety by them, as well as impropriety by Chief Justice Nix in interfering in a pending trial in Lehigh County, Commonwealth v. David Lee Yohn, and in the Supreme Court's handling of Yohn's petition for allowance of appeal. Allegations included:

a. justice received kickbacks for directing bond work to an underwriting law firm;

b. a justice met ex parte with litigants;

c. justices rewarded an attorney for illegal assistance in offering free legal services;

d. a justice granted favorable treatment to a litigant seeking reconsideration for illegal and extra-judicial reasons;

e. Chief Justice Nix improperly interfered in the pending trial in Commonwealth v. David Lee Yohn, and that the Supreme Court improperly handled Yohn's petition for allowance of appeal over the course of three and one-half years, eventually denying Yohn's petition; and,

f. that despite the obvious improper behavior of Chief Justice Nix, no investigation was undertaken or charges made against Chief Justice Nix.

23. On December 6, 1992, Justice Cappy wrote to Chief Justice Nix:

> "As a result of my vote to discipline Mr. Justice Larsen at No. 155. JIRB Docket 1992, he has made assertions against me in his Petition for Disqualification and Recusal which not only challenges my personal integrity, but also the integrity of the Supreme Court of Pennsylvania.
>
> "* * * However, since the integrity of the Court and its operating procedures have been placed in question in the minds of the public . . .

> "As for me, I welcome enthusiastically the investure of such a panel, less so for the inevitable complete demudding of my name than for the just response it will give to Pennsylvania citizens, proper demand for accountability, fair play and truth-telling."

24. No later than December 20, 1992, as a result of the allegations of Justice Larsen in his petitions, former attorney general Ernie Preate, Jr., appointed two special counsels to investigate the allegations.

25. On December 31, 1992, the Philadelphia Inquirer published an article entitled "Sources say Justice Larsen could face more severe discipline - even removal." The article said:

> "Pennsylvania Supreme Court Justice Rolf Larsen could be removed from the bench as a result of his own for review of a disciplinary case against him, according to sources close to the court.
>
> "Removal would be the most dramatic of a range of possible consequences that could result from Larsen's request that the court reconsider its October decision to reprimand him. The court, by a 2-1 ruling on Oct. 14, found that Larsen had improperly communicated with a lower court judge about a pending case in 1986.
>
> "In asking for a reconsideration last month, Larsen, who denies any misconduct, made

sweeping accusations against the two justices who had voted to reprimand him, Stephen A. Zappala and Ralph J. Cappy.

"Those justices, according to knowledgeable sources, now are reviewing Larsen's request and re-examining the massive record of an investigation by the state Judicial inquiry and Review Board (JIRB) into Larsen's conduct, an inquiry that led to the reprimand vote.

"The sources, who would not agree to be named in print, said the review was being conducted on an accelerated, top priority basis and could be completed within two or three weeks.

"One source said that Larsen's removal was a possibility but that the court could decide to take a lesser action, such as simply upholding the reprimand. The source stressed that no decision has been made.

"Two other sources said they believed removal was likely. 'That's definitely the way they're going,' said one; they may 'bounce him like a basketball.'

"The second source said that Larsen, in requesting reconsideration of the reprimand, had 'fashioned the club that beats him to death.'

* * * *

"Long-simmering animosities among some of the seven Supreme Court justices have come to a head in the Larsen case."

26. As part of the investigation purportedly of Justice Larsen's allegations, the special counsels impaneled the Ninth Statewide Investigating Grand Jury, which heard testimony over a nine-month period in 1993, including testimony from Justice Larsen and Chief Justice Nix.

27. In January, 1993, Rep. Christopher K. McNally filed a Petition in the Pennsylvania House of Representatives ("House"), calling for Justice Larsen's impeachment, and accusing him of violations of the Code of Judicial Conduct.

28. The grand jury reported two areas of alleged misconduct by Justice Larsen: that he systematically maintained a list of petitions for allowance of appeal to be given special handling by his staff; and, that he regularly obtained prescription medications for his own use by causing a physician to issue prescriptions in the names of members of his staff.

29. On October 22, 1993, the grand jury issued Presentment No. 5 recommending that criminal charges be brought against Justice Larsen regarding the prescription drugs.

30. On October 25, 1993, G. Thomas Gates, supervising judge, issued an order accepting Presentment No. 5.

31. On October 28, 1993, Justice Larsen was charged with criminal conspiracy and multiple violations of the Controlled Substances Act. That same day, the Supreme Court relieved Justice Larsen from all judicial duties. However, Justice Larsen continued to receive his salary.

32. On November 5, 1993, grand jury report no. 1 was made public.

33. Grand jury report no. 1 became the basis for investigation of Justice Larsen by the Pa. House and the Judicial Conduct Board. The Pa. House Judiciary Committee requested, and apparently received from the Attorney General, copies of the testimony given (of approximately 220 witnesses) and exhibits presented, to the grand jury. This grand jury material was not then made available to Justice Larsen.

34. On November 23, 1993, the Pennsylvania House adopted House Resolution No. 205, session of 1993, authorizing its judiciary committee to investigate the conduct of Justice Larsen. After public hearings and investigation, the judiciary subcommittee on courts issued a report and recommendation.

35. On January 26, 1994, David Lee Yohn filed a writ of habeas corpus in federal court in Philadelphia.

36. On April 9, 1994, after a five day trial, Justice Larsen was convicted of two counts of criminal conspiracy under the Controlled Substances Act.

37. On April 22, 1994, the House subcommittee on courts voted to recommend to the entire House a resolution, to impeach Justice Larsen.

38. On May 18, 1994, House Resolution 324 was introduced, listing seven Articles of Impeachment against Justice Larsen.

39. On May 24, 1994, Resolution 324 was adopted by the House.

40. Article 5 alleged Justice Larsen's statements in his petitions were false and made in bad faith with a reckless disregard for the truth, and were made to obtain a reversal of his reprimand. The Senate later acquitted Justice Larsen of this Article.

41. On June 6, 1994, the Senate received the Articles of Impeachment from the House Managers, and passed a resolution, appointing an impeachment committee.

42. Pursuant to Article V of the Pennsylvania Constitution, no person shall be convicted without the concurrence of two thirds of the members of the Senate present.

43. The Senate had on July 23, 1993, adopted Article X of the Rules of Practice and Procedure in the Senate when sitting on Impeachment Trials. The Rules set forth the procedure by which the Senate would conduct the Impeachment Trial of Justice Larsen.

44. Article X established the Senate Impeachment Committee ("the Committee"), a committee of six Senators,

each of whom would be appointed by the President Pro Tempore, to conduct evidentiary hearings by examining documents and listening to live testimony.

45. Senator Robert C. Jubelirer, President Pro Tempore of the Senate, appointed Senators Stewart J. Greenleaf, Charles D. Lemmond, Jr., H. Craig Lewis, Jeannette F. Reibman, Tim Shaffer and Hardy Williams, to the Committee.

46. On June 20, 1994, Justice Larsen filed an answer with new matter to the Articles of Impeachment.

47. On June 30, 1994, Justice Larsen filed an omnibus pretrial motion with the Senate, moving that the Senate dismiss this action for various reasons and, in addition, that the impeachment trial be held before the full Senate.

48. Justice Larsen's pretrial motion also contained a motion for a pretrial hearing before the full Senate, a motion for discovery, a motion for payment of attorney's fees and costs, a motion for recusal of certain Senators and a motion for continuance.

49. On August 8, 1994, while the full Senate was not in session, the Committee began evidentiary hearings on the impeachment of Justice Larsen and concluded the hearings on September 9, 1994.

50. On September 20, 1994, the full Senate heard arguments by counsel and without debate voted to deny all of plaintiff's pretrial motions.

51. On September 27, 1994, the full Senate convened and heard closing arguments by the House Managers and Justice Larsen's counsel. Simultaneously, the Committee provided for the first time each Senator with its Final Report of the Senate Impeachment Committee ("Final Report"), which provided a purported summary of evidence presented for the seven Articles of Impeachment. A copy was given to counsel for plaintiff at the same time for the first time.

52. On October 4, 1994, the Senate voted on the seven Articles of Impeachment. Justice Larsen was convicted by a vote of 44 to 5 on Article II of the Articles of Impeachment. Justice Larsen was acquitted on the other six Articles. The Senate then voted unanimously to bar Justice Larsen from holding any office of trust or profit under the Commonwealth of Pennsylvania.

53. Article II alleged that in 1988 Justice Larsen had encouraged improper contact by Pittsburgh lawyer, Richard Gilardi, who asked Justice Larsen personally to review two petitions and then, at Justice Larsen's direction, gave him the cover sheets of the cases, writing "yes" on the petition he wanted granted and "no" on the petition he wanted denied.

54. Justice Larsen had property and liberty interests in his office as a Justice on the Supreme Court of Pennsylvania.

55. Justice Larsen had property and liberty interests in not being barred from holding office.

56. Justice Larsen's property and liberty interests were protected by the due process clause of the Fourteenth Amendment to the United States Constitution.

57. The proceedings by their nature were subject to guarantees of the Sixth Amendment to the United States Constitution, including an impartial fact-finder, confrontation with witnesses, and assistance of counsel.

58. The proceedings leading up to the conviction of Justice Larsen did not constitute a trial, and violated process due under the circumstances and in light of the interests involved, including process due under the Sixth Amendment, for each of the following reasons:

a. Most members of the Senate, who were not members of the Committee. did not hear any evidence against Justice Larsen on Article II. Additionally, members of the Committee frequently absented themselves during the hearings.

b. Decision on Article II, required those who voted, to weigh contradictory testimony of Justice Larsen and Mr. Gilardi. Justice Larsen testified, without qualification, that he was innocent of the charge in Article II. A former secretary to Justice Larsen, Barbara Roberts, testified in a manner inconsistent with the testimony of both Justice Larsen and Mr. Gilardi. Ms. Roberts was impeached by evidence that she was a disgruntled fired employee, and was romantically involved with Mr. Gilardi. The Final Report did not address

the credibility of witnesses or make a recommendation.

c. Given the nature of the charge, the remoteness in time of the events alleged, motivation of witnesses, and the sharply conflicting testimony, due process required members of the Senate to hear and observe the witnesses testify in person.

d. The Committee and the Senate refused Justice Larsen's request that a standard of proof be established, and, in fact, a standard of proof was never established.

e. The Committee and the Senate refused Justice Larsen's request that they adopt rules of evidence for the hearings, and, in fact, rules of evidence were never adopted.

f. Because of the simultaneous issuance of the Final Report and the closing arguments, Justice Larsen was not afforded the opportunity to review, address, rebut or clarify the Final Report. Justice Larsen was not given opportunity to testify or call witnesses in opposition to the Final Report.

g. The Final Report was misleading and did not accurately or fully represent the facts produced at trial.

h. During the evidentiary hearings and closing arguments, Justice Larsen was precluded from

establishing that adverse witnesses had ex-parte communications with members of the Senate and members of the Committee.

i. Justice Larsen was precluded from effectively cross-examining adverse witnesses.

j. Senator Vincent Fumo, who voted to convict and otherwise participate in the proceedings as a Senator, also appeared as a witness in the proceedings.

k. Another Senator who harbored ambitions of being a Pennsylvania Supreme Court Justice, served as a member of the Committee and voted to convict.

l. Justice Larsen's pretrial motions were decided post-trial.

m. Justice Larsen's request to continue the proceedings were denied because of a scheduled rush to judgment. Shortly before the hearings began, an avalanche of material had been delivered to Justice Larsen's counsel, but because of the time limitations, they were never able to be reviewed.

n. Justice Larsen was precluded from establishing the effect that Legislative Initiative Grants had on the proceedings, Senators and adverse witnesses. Such grants, known as "Walking Around Money," or "WAMS," are highly sought after

discretionary funds awarded directly by individual Senators to whomever they want and are used by each party's leadership to maintain voting discipline among the other Senators.

o. Justice Larsen was precluded from establishing that adverse witnesses, their agents, or relatives had made financial contributions to certain members of the Senate, including Senators who sat on the Committee.

p. The Senate's finding of guilty as to Article II of the Articles of Impeachment is in direct conflict with the Senate's finding of acquittal as to Article III of the Articles of Impeachment. The Senate acquitted Justice Larsen (Article III) of testifying falsely when he testified, priority, very specifically, in detail and without qualification, that the alleged events that Justice Larsen was alleged to have participated in, as set forth in Article II, did not occur.

q. The Senate's finding of guilty as to Article II of the Articles of Impeachment is in direct conflict with the Senate's finding of acquittal as to Article VII and violates Article 6, Section 7 of the Pennsylvania Constitution.

r. The Senate's finding of guilty as to Article II of the Articles of Impeachment was an

influenced decision instead of a reasoned decision.

59. Justice Larsen was denied the appearance of justice in that he was not informed at any time how the members of the Senate, other than members of the Committee, became acquainted with the evidence (if they did). After his conviction, Justice Larsen, through counsel, asked members of the Senate voting for his conviction, other than members of the Committee, whether they read transcripts of witnesses relating to Article II or viewed their testimony on television. members of the Senate have failed to say how they became acquainted with the evidence.

60. By memorandum and order dated May 5, 1995, the U.S. District Court for the Eastern District of Pennsylvania (Judge Clarence C. Newcomer) granted David Lee Yohn's writ of habeas corpus, and said that Chief Justice Nix's interference in the Yohn trial was "particularly egregious" and "nothing other than a gross abuse of the jurisdictional limits of his power." Judge Newcomer noted that the "Supreme Court's handling of the petition was, at the very least, unprincipled," and that "several holds were placed on the-petition, in large part to avoid the embarrassment of airing the internal disputes of the Supreme Court publicly." Yohn v. Love, No. 94-524 (E.D. Pa. 5/5/95).

61. On February 9, 1996, the U.S. Court of Appeals for the Third Circuit affirmed the district court's order granting Yohn's writ of habeas corpus. Yohn v. Love, No. 95-1412 (3d Cir, 2/10/96).

Part I(b) Larsen v. Senate and Senators

62. Paragraphs 1 - 61 above are incorporated herein by reference as if fully set forth at length.

63. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to proceed against him, and leading to the decisions to remove him from office and bar him from ever holding public office in Pennsylvania, and in the decisions themselves.

64. Justice Larsen's statements involve matters of public concern, in that they involve the conduct and integrity of the Supreme Court, and those charged with investigating the conduct of the Supreme court.

65. Justice Larsen was injured in that he was removed from office and barred from ever holding public office in Pennsylvania.

66. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to remove him from office and bar him from ever holding public office in Pennsylvania, were in violation of the First Amendment.

Part II(a) - Larsen v.. Supreme Court of Pennsylvania,
Court of Judicial Discipline,
and Judicial Conduct Board, et. al.

67. The Supreme Court of Pennsylvania, Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos,

Ralph Cappy, and Frank Montemuro are made Defendants herein.

68. The CJD, Joseph F. McCloskey, William F. Burns, Dawson R. Muth, Peter DePaul, Carol K. McGinley, Christine L. Donahue, and Justin M. Johnson are made defendants herein.

69. The JCB, Joseph A. Del Sole, Gerard P. Egan, Arthur J. Edmunds, Ms. Diane M. Edmundson, John W. Herron, Frederick wells Hill, Matthew Anita MacDonald, Gerald J. O'Connor, Andrew Palm, Charles W. Rubendall, II, James E. Russo, Bernard C. Watson, William J. Arbuckle, III, Bruce A. Antkowiak, and Thomas A. Bergstrom are made defendants herein.

70. On May 18, 1993, the electorate in the Commonwealth of Pennsylvania adopted an amendment ("1993 Amendment") to Article V of the Pennsylvania Constitution, changing the judicial discipline system.

71. The 1993 Amendment established a two-tiered system of judicial discipline. Under the new system, the JCB investigates allegations of misconduct and may file formal complaints with the CJD. The CJD then decides the merits of the case and, in appropriate cases, enters an order of discipline. Appeals from decisions of the CJD are to the Supreme Court of Pennsylvania, unless the respondent judicial officer is a Justice of the Supreme Court,.in which case a Special Tribunal of seven judges of the Superior and Commonwealth Courts, who are not members of the JCB or the CJD, hear the appeal.

72. Part of the 1993 Amendment, Article V, Section(d)(2) says that "... the [CJD] may issue an interim order directing the suspension, with or without pay, of any justice, Judge, or justice of the peace against whom formal charges have been filed with the [CJD] by the [JCB] or against who has been filed an indictment or information charging a felony".

73. Article V, Section 18(a)(5), says that "the [JCB] shall prescribe general rules governing the conduct of members." Pursuant thereto in 1993, the JCB adopted the Interim Rules of Procedure Governing the Judicial Conduct Board ("Interim Rules"). These rules specifically omitted "felony indictment or information" as a basis for interim suspension.

74. Rule 10 of the Interim Rules limits (and attempts to extend) the JCB's power, authority and jurisdiction to seek an interim order of suspension to only two situations: one, if the "continued service of the judicial officer is causing or may cause immediate and substantial public harm;" two, if "the continued service of the judicial officer may erode public confidence in the orderly administration of justice."

75. On October 28, 1993,. the Attorney General of Pennsylvania, then Ernie Preate, Jr., announced that he was charging Justice Larsen with certain violations of the law involving his obtaining of his prescribed drugs for the treatment of chronic depression and anxiety. On the same day the Supreme Court of Pennsylvania entered an order relieving Justice Larsen of all of his judicial and administrative responsibilities and duties as a Supreme Court Justice.

76. On January 7, 1994, Pennsylvania, by its Attorney General, filed an information in the Court of Common Pleas of Allegheny County, charging Justice Larsen with 28 certain felonies, including the placing of prescription medications meant to be used by Justice Larsen in the names of others in order to protect his privacy.

77. In January 1994, the JCB wrote to Justice Larsen that it was instituting an investigation into all his activities.

78. On March 10, 1994, the JCB notified Justice Larsen to continue the investigation, pursuant to "J.C.B.I.R.P. 7(A)(4)."

79. On March 10, 1994, the JCB filed an application with the CJD for an interim order directing the suspension of Justice Larsen with pay, on the basis that Justice Larsen had been charged with a felony, and said that if Justice Larsen was found guilty of a felony charge then the JCB's requested suspension with pay be automatically converted to a suspension without pay.

80. On or about March 20, 1994, Justice Larsen filed an answer and new matter to the JCB's application. on March 25, 1994, the CJD issued an order denying the application.

81. On April 18, 1994, the JCB again filed an application with the CJD for an interim order directing the suspension of Justice Larsen without pay (the "Application") based this time on the fact of a jury in the Allegheny County Court of Common Pleas finding Justice Larsen guilty of two

of the aforementioned charges (conspiracy). Sentencing had not occurred. The convictions are presently on appeal.

82. The JCB lacked the power and jurisdiction to file the Application with the CJD because neither one of the abovementioned criteria was applicable. Justice Larsen had already been relieved from his judicial duties by the October 1993, order of the Supreme Court. It was impossible for him to harm the public or erode the confidence in the orderly administration of justice, and these two criteria were not set forth in the application for suspension.

83. Rule 10 of the Interim Rules says that the JCB may move for the suspension of a judicial officer, "If, when it authorizes the filing of formal charges, the JCB believes that ..." one of the above-mentioned criteria is met.

84. The JCB had not filed any formal charges against Justice Larsen. Therefore, pursuant to the JCB's Interim Rules, the JCB lacked the authority/power/jurisdiction to file the application for an order of suspension with or without pay.

85. On May 5, 1994, Justice Larsen filed his answer and new matter to the JCBIs application.

86. On May 16, 1994, the JCB filed a response to new matter.

87. On May 25, 1994, a hearing was held before the CJD. Exhibits showing the criminal information and jury verdicts were admitted into evidence.

88. Counsel for Justice Larsen moved that the hearing be bifurcated to allow the introduction of testimony at a later date. The CJD denied the motion.

89. On June 3, 1994, the CJD granted the application for an interim order directing the suspension of Justice Larsen without pay.

90. On June 6, 1994, the JCB filed with the CJD, "Board Complaint - Formal Charges" against Justice Larsen, alleging, among other things, matters alleged in his petitions for disqualification and recusal of Justice Zappala and Justice Cappy.

91. Article V, Section 18(b)(3), of the Pennsylvania Constitution, says that "the [CJD] shall proscribe general rules governing the conduct of members." Section 18(b)(4) says, "The [CJD] shall adopt rules to govern the conduct of the proceedings before the [CJD]. The CJD adopted such rules. Rule 2, "Scope of Rules," says, "These rules shall govern the conduct of all proceedings before the Court of Judicial Discipline."

92. The CJD did not adopt any rules for interim orders of suspension with or without pay; thus the CJD did not have the authority or jurisdiction to issue an interim order suspending Justice Larsen without pay. Additionally, the linchpin words of the suspension are"the words of the Constitution of Pennsylvania, i.e., "an indictment or information charging a felony," Article V, Section(d)(2). Nowhere is the word "conviction" used. When the CJD entered its order of March 25, 1994, denying suspension of Justice Larsen that adjudicated the matter and became the law of the case -- nothing constitutionally had intervened to give

any vitality to its June 3, 1994, suspension order. Additionally, the CJD reaffirmed its June 3, 1994, order of suspension by an order dated January 24, 1995.

93. When the CJD issued the interim suspension order without pay, it violated its own rules and acted beyond its Pennsylvania constitutional powers.

94. Pursuant to Article V, Section 18(d)(3), interim orders of suspension, with or without pay, are nonappealable. Therefore, no appeal process was available to Justice Larsen.

95. Additionally, the CJD and its members and the JCB and its members and employees have acted illegally and without jurisdiction in a manner harmful to Justice Larsen by wrongfully asserting by petitions, briefs, hearing dates and orders that they have jurisdiction over Justice Larsen's right to practice law in the Commonwealth of Pennsylvania.

96. On August 25, 1993, a per curium order was issued by the Supreme Court of Pennsylvania, by Chief Justice Nix and Justices John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, and Frank Montemuro, with Justice Larsen dissenting, appointing Joseph F. McCloskey, Carol K. McGinley, Peter DePaul and Dawson R. Muth to the CJD and appointing Joseph A. Del Sole, Frederick wells Hill, Gerald J. O'Connor, Andrew Palm, James E. Russo and Bernard C. Watson, to the JCB.

97. The appointments to the JCB and the CJD were done in an improper manner to deny Justice Larsen due

process of law and equal protection of the law in the within proceedings.

98. Some members of the JCB and the CJD were appointed to serve because they had close ties to members of the Supreme Court, with the result that Justice Larsen was denied due process of law and equal protection of the law.

99. The actions and proceedings above, including the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members, to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law, were in violation of the due process and equal protection clauses of the Fourteenth Amendment to United States Constitution.

Part II(b) - Larsen v. Supreme Court of Pennsylvania, Court of Judicial Discipline, and Judicial Conduct Board, et. al.

100. Paragraphs 1 - 99 above are incorporated by reference herein as if fully set forth at length.

101. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members. to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law.

102. Justice Larsen's statements involve matters of public concern, in that they involve the conduct and integrity

of the Supreme Court, and those charged with investigating the conduct of the Supreme Court.

103. Justice Larsen was injured in that he was suspended without pay and improper action was taken against him with respect to his right to practice law.

104. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to appoint members to the JCB and CJD who had close ties to Supreme Court members, to lodge improper charges against Justice Larsen, to issue an interim order suspending him without pay, and to take action with respect to his right to practice law, were in violation of the First Amendment.

Part III(a) - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

105. The Supreme Court of Pennsylvania, Robert Nix, John Flaherty, Stephen Zappala, Nicholas Papadakos, Ralph Cappy, Frank Montemuro and Ronald Castille are made defendants herein.

106. Administrative office of Pennsylvania Courts, Nancy M. Sobolevitch and David A. Frankfort er are made defendants herein.

107. In January 1974, when Justice Larsen became a member of the Pennsylvania judiciary, one of the terms and conditions of his service was a medical plan that provided lifetime medical benefits for members of the judiciary with 20 or more years of service, regardless of age.

108. On or about December 12, 1989, the Pennsylvania Supreme Court adopted a new medical insurance plan for retired members of the state judiciary.

109. The new plan provides lifetime benefits for members of the judiciary with 10 or more years of service, regardless of age.

110. Benefits under the new plan include "Fully State-Paid Basic & Specialized Coverage." "Basic" coverage includes hospital and medical expenses, etc. "Specialized" coverage includes dental, vision, hearing and prescription drug expenses.

111. As of December 12, 1989, Justice Larsen had served as a member of the judiciary for over 10 years. As a result, Justice Larsen's benefits vested as of December 12, 1989, and he was entitled to "Fully State-Paid Basic & Specialized Coverage" for life upon separation from the judiciary.

112. As of January 1994, Justice Larsen had served as a member of the judiciary for 20 years.

113. On or about June 17, 1994, defendant Frankforter, on behalf of the above defendants, informed Justice Larsen that he would no longer receive "Fully State-Paid Basic & Specialized Coverage" as of the close of business on June 3, 1994, on the purported basis of an amendment to Article V, Section 16, of the Pennsylvania Constitution, effective August 18, 1993.

114. The constitutional amendment above had no effect on Justice Larsen's entitlement to "Fully State-Paid

Basic & Specialized Coverage which vested as of December 12, 1989.

115. Defendants violated the equal protection clause of the Fourteenth Amendment by denying Justice Larsen "Fully State-Paid Basic & Specialized Coverage," to which he was entitled for his lifetime. other members of the judiciary, who qualified for lifetime benefits and were later removed from office under similar circumstances, continue to receive state-paid medical benefits, whereas Justice Larsen does not.

116. Defendants violated the impairment of contracts clause of the U.S. Constitution by denying Justice Larsen continued "Fully State-Paid Basic & Specialized Coverage," to which he was entitled, in applying the amendment to Article V, Section 16, of the Pennsylvania Constitution, effective August 18, 1993, retroactively to Justice Larsen, whereas his lifetime entitlement to "Fully State-Paid Basic & Specialized Coverage," had become vested as of December 12, 1989.

117. Defendants violated the due process clause by arbitrarily denying Justice Larsen "Fully State-Paid Basic & Specialized Coverage," to which he was entitled.

118. Justice Larsen was offered the opportunity to establish a direct-pay medical insurance policy as a participant in the community-based medical insurance program which Blue Cross/Blue Shield offered.

119. Justice Larsen's payments under this option were much higher than if he was participating in the Commonwealth's group plan and his benefits were

significantly lower. A direct-pay plan did not exist for specialized coverage, therefore, he was unable to obtain dental, vision, hearing and prescription drug insurance other than on a individual basis.

120. As a result of defendants' wrongful denial of Justice Larsen's medical benefits, he has incurred many thousands of dollars in medical expenses he would not have incurred if he had remained covered under "Fully State-Paid Basic & Specialized Coverage."

Part III(b) - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

121. Paragraphs 105 - 120 above are incorporated by reference herein as if fully set forth at length.

122. 42 U.S.C., Section 300bb-1, et. seq., provides that state and local government group health plans must provide continuation coverage to certain individuals such as Justice Larsen. Coverage must consist of coverage which, as of the time the coverage is being provided, is identical to the coverage provided under the plan to similarly situated beneficiaries with respect to whom a qualifying event has not occurred. Such coverage shall be for 18 months. Justice Larsen was also denied this coverage by defendants.

123. No qualifying event occurred within the meaning of 42 U.S.C., Section 300bb-1.

124. Defendants' wrongful denial of Justice Larsen's medical benefits constitutes a violation of 42 U.S.C., Section 300bb-1, et. seq., in that he was not afforded identical coverage.

125. As a result of defendants' wrongful denial of Justice Larsen's medical benefits, he has incurred many thousands of dollars in medical expenses he would not have incurred if he had remained covered under "Fully State-Paid Basic & Specialized Coverage."

Part III© - Larsen v. Supreme Court of Pennsylvania, and Administrative Office of Pennsylvania Courts, et al.

126. Paragraphs 1 - 125 above are incorporated by reference herein as if fully set forth at length.

127. The statements of Justice Larsen in his petitions for disqualification and recusal were substantial or motivating factors in the decisions to deny him "Fully State-Paid Basic & Specialized Coverage" for his lifetime under the medical plan, and to deny him such coverage for at least 18 months under PHSA.

128. Justice Larsen's statements involve matters oil public concern, in that they involve the conduct and integrity of the Supreme Court, and those charged with investigating the conduct of the Supreme Court.

129. Justice Larsen was injured in that he was denied medical benefits to which he was entitled, and he incurred thousands of dollars in medical expenses.

130. Justice Larsen's statements in the petitions were protected by the speech and petition clauses of the First Amendment to the U.S. Constitution, and the decisions to deny him "Fully State-Paid Basic & Specialized Coverage" for his lifetime under the medical plan, and to deny him such

coverage for at least 18 months under PHSA, were in violation of the First Amendment.

WHEREFORE, plaintiff Rolf Larsen demands judgment in his favor as follows:

(1) against the Senate and Senators in their official capacities, granting declaratory and injunctive relief, voiding the Senate impeachment verdict of guilty on Article !I;

(2) against the Senators in their personal capacities, awarding damages including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees;

(3) against the Supreme Court, Court of Judicial Discipline, Judicial Conduct Board, and all individual members, in their official capacities, granting declaratory and injunctive relief: (i) voiding the Court of Judicial Discipline's order dated June 3, 1994, of suspension without pay; (ii) voiding the appointments to the Judicial Conduct Board and the Court of Judicial Discipline; and, (iii) voiding the action of interfering with Plaintiff's right to practice law;

(4) against the Supreme Court, Court of Judicial Discipline, Judicial Conduct Board, and all individual members, in their personal capacities, awarding damages, including loss of past and future wages and benefits, emotional harm, injury to reputation, and counsel fees;

(5) against the Supreme Court and individual justices and Administrative Office and individual members in their official capacities, granting declaratory and injunctive relief, voiding the action of terminating plaintiff's health and medical benefits;

(6) against the Supreme Court and individual justices and Administrative office and individual members in their personal capacities, awarding damages for medical expenses incurred by plaintiff from June 4, 1994, to date; and,

(7) against all individual defendants in their personal capacities for punitive damages and such other relief as the court may find appropriate.

Plaintiff also demands attorneys fees and costs of litigation for this action against all defendants, pursuant to 42 U.S.C., Section 1988.

Dated: February 26, 1996.

/s/ Michael S. Fettner

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